

for the fair and efficient adjudication of this action, and Plaintiff envisions no unusual difficulty in the management of this action as a class action.

29. The undersigned counsel for Plaintiff and the Class request that the Court appoint them to serve as class counsel first on an interim basis and then on a permanent basis. Undersigned counsel will fairly and adequately represent the interests of the class, have identified or investigated the Class's potential claims, are experienced in handling class actions, other complex litigation, and consumer claims of the type asserted in the action, know the applicable law, will commit sufficient resources to represent the class, and are best able to represent the Class.

30. Plaintiff requests this Court to certify this Class in accordance with Rule 23 and the Class Action Fairness Act of 2005.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Breach of Implied Warranty

31. Plaintiff hereby adopts and incorporates by reference paragraphs 1-30 as if more fully set forth herein.

32. Defendants manufactured, marketed, sold and distributed the Products.

33. At the time that Defendants marketed, sold, and distributed the Products, Defendants knew of the purpose for which the Products were intended and impliedly warranted that the Products were of merchantable quality and safe and fit for such use.

34. Plaintiff reasonably relied upon the skill, superior knowledge and judgment of the Defendants as to whether the Products were of merchantable quality and safe and fit for its intended use.



35. Due to Defendants' wrongful conduct as alleged herein, Plaintiff could not have known about the risks and side effects associated with the Products until after ingestion by Plaintiff's cats.

36. Contrary to such implied warranty, the Products were not of merchantable quality and were not safe or fit for their intended use.

37. As a direct and proximate result of Defendants' breach of implied warranty, Plaintiff suffered damages as alleged herein.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

(a) For an order certifying the Class under the appropriate provisions of Rule 23, as well as any appropriate subclasses, and appointing Plaintiff and their legal counsel to represent the Class;

(b) Awarding actual and consequential damages;

(c) Granting injunctive relief;

(d) For pre- and post-judgment interest to the Class, as allowed by law;

(e) For reasonable attorneys' fees and costs to counsel for the Class if and when pecuniary and non-pecuniary benefits are obtained on behalf of the Class; and

(f) Granting such other and further relief as is just and proper.

SECOND CAUSE OF ACTION

Breach of Express Warranty

38. Plaintiff hereby adopts and incorporates by reference paragraphs 1-30 as if more fully set forth herein.

39. Defendants expressly warranted that the Products were safe for consumption by pets.

40. The Products did not conform to these express representations because the Products are not safe and cause serious side effects in pets, including death.

41. As a direct and proximate result of the breach of said warranties, and as the direct and legal result of the defective condition of the Products as manufactured and/or supplied by Defendants, and other wrongdoing of Defendants described herein, Plaintiff was caused to suffer damages.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

- (a) For an order certifying the Class under the appropriate provisions of Rule 23, as well as any appropriate subclasses, and appointing Plaintiff and their legal counsel to represent the Class;
- (b) Awarding actual and consequential damages;
- (c) Granting injunctive relief;
- (d) For pre- and post-judgment interest to the Class, as allowed by law;
- (e) For reasonable attorneys' fees and costs to counsel for the Class if and when pecuniary and non-pecuniary benefits are obtained on behalf of the Class; and
- (f) Granting such other and further relief as is just and proper.

THIRD CAUSE OF ACTION

Negligence

42. Plaintiff hereby adopts and incorporates by reference paragraphs 1-30 as if more fully set forth herein.

43. Defendants owed Plaintiff a duty to only offer safe, non-contaminated products for consumption by household pets.

44. Through its failure to exercise the due care, Defendants breached this duty by producing, processing, manufacturing, and offering for sale the Products in a defective condition that was unhealthy to the Plaintiff's pets.

45. Additionally, Defendants breached their duty of care to Plaintiff by failing to use sufficient quality control, perform adequate testing, proper manufacturing, production, or processing, and failing to take sufficient measures to prevent the Products from being offered for sale, sold, or fed to pets.

46. Defendants knew or, in the exercise of reasonable care should have known, that the Products presented an unacceptable risk to the pets of the Plaintiff, and would result in damage that was foreseeable and reasonably avoidable.

47. As a direct and proximate result of Defendants' above-referenced negligence, Plaintiff and has suffered loss and damages.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

(a) For an order certifying the Class under the appropriate provisions of Rule 23, as well as any appropriate subclasses, and appointing Plaintiff and their legal counsel to represent the Class;

(b) Awarding actual and consequential damages;

(c) Granting injunctive relief;

(d) For pre- and post-judgment interest to the Class, as allowed by law;

(e) For reasonable attorneys' fees and costs to counsel for the Class if and when pecuniary and non-pecuniary benefits are obtained on behalf of the Class; and

(f) Granting such other and further relief as is just and proper.

FOURTH CAUSE OF ACTION

Strict Product Liability

48. Plaintiff hereby adopts and incorporates by reference paragraphs 1-30 as if more fully set forth herein.

49. Defendants are producers, manufacturers and/or distributors of the Products.

50. The Products produced, manufactured and/or distributed by Defendants were defective in design or formulation in that, when the Products left the hands of the Defendants, the foreseeable risks exceeded the benefits associated with the design or formulation.

51. Defendants' Products were expected to and did reach the Plaintiff without substantial change in condition.

52. Alternatively, the Products manufactured and/or supplied by Defendants were defective in design or formulation, in that, when they left the hands of the Defendants, they were unreasonably dangerous, more dangerous than an ordinary consumer would expect, and more dangerous than other pet food products without concomitant accurate information and warnings accompanying the product for the Plaintiff to rely upon.

53. The Products produced, manufactured and/or distributed by Defendants were defective due to inadequate warning and/or inadequate testing and study, and inadequate reporting regarding the results of same.

54. The Products produced, manufactured and/or distributed by Defendants were defective due to inadequate post-marketing warning or instruction because, after Defendants knew or should have known of the risk of injury from the Products, Defendants failed to immediately provide adequate warnings to the Plaintiff and the public.

55. As the direct and legal result of the defective condition of the Products as produced, manufactured and/or distributed by Defendants, and of the negligence, carelessness, other wrongdoing and actions of Defendants described herein, Plaintiff suffered damages.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

(a) For an order certifying the Class under the appropriate provisions of Rule 23, as well as any appropriate subclasses, and appointing Plaintiff and their legal counsel to represent the Class;

(b) Awarding actual and consequential damages;

(c) Granting injunctive relief;

(d) For pre- and post-judgment interest to the Class, as allowed by law;

(e) For reasonable attorneys' fees and costs to counsel for the Class if and when pecuniary and non-pecuniary benefits are obtained on behalf of the Class; and

(f) Granting such other and further relief as is just and proper.

FIFTH CAUSE OF ACTION

Unjust Enrichment

56. Plaintiff hereby adopts and incorporates by reference paragraphs 1-30 as if more fully set forth herein.

57. As a direct, proximate, and foreseeable result of Defendants' acts and otherwise wrongful conduct, Plaintiff suffered damages. Defendants profited and benefited from the sale of the Products, even as the Products caused Plaintiff to incur damages.

58. Defendants have voluntarily accepted and retained these profits and benefits, derived from consumers, including Plaintiff, with full knowledge and awareness that, as a result of

Defendants' unconscionable wrongdoing, consumers, including Plaintiff, were not receiving products of the quality, nature, fitness, or value that had been represented by Defendants or that reasonable consumers expected. Plaintiff purchased pet food that she expected would be safe and healthy for her cats and instead has had to now endure the death of one of her beloved pets and the hospitalization of the other.

59. By virtue of the conscious wrongdoing alleged in this Complaint, Defendants have been unjustly enriched at the expense of the Plaintiff who is entitled to, and hereby seeks, the disgorgement and restitution of Defendants' wrongful profits, revenue, and benefits, to the extent, and in the amount, deemed appropriate by the Court; and such other relief as the Court deems just and proper to remedy Defendants' unjust enrichment.

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for relief and judgment against Defendants as follows:

(a) For an order certifying the Class under the appropriate provisions of Rule 23, as well as any appropriate subclasses, and appointing Plaintiff and her legal counsel to represent the Class;

(b) Awarding reimbursement, restitution and disgorgement from Defendants of the benefits conferred by Plaintiff and the Class;

(c) For pre- and post-judgment interest to the Class, as allowed by law;

(d) For reasonable attorneys' fees and costs to counsel for the Class if and when pecuniary benefits are obtained on behalf of the Class; and

(e) Granting such other and further relief as is just and proper.

JURY DEMAND

Plaintiff and the Class demands a jury trial on all issues triable by a jury.

DATED: March 26, 2007

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Attorneys for Plaintiff and the Class

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS CHRISTINA TROIANO, Individually and on Behalf of all Others Similarly Situated		DEFENDANTS MENU FOODS, INC. and MENU FOODS INCOME FUND	
(b) County of Residence of First Listed Plaintiff Broward		(b) County of Residence of First Listed Defendant Camden	
(c) Attorney's (Firm Name, Address, and Telephone Number)		NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.	
LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP 120 E. Palmetto Park Road, Suite 500 Boca Raton, FL 33432-4809 (Phone: 561-750-3000)		Attorneys (If Known)	

(d) Check County Where Action Arose: ☐ MIAMI-DADE ☐ MONROE ☒ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ FLORIDA RIVER ☐ OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)		III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)	
☐ 1 U.S. Government Plaintiff	☐ 3 Federal Question (U.S. Government Not a Party)	Citizen of This State	☒ 1 ☐ 2 ☐ 3
☐ 2 U.S. Government Defendant	☒ 4 Diversity (Indicate Citizenship of Parties in Item III)	Citizen of Another State	☐ 2 ☐ 3 ☐ 4
		Citizen or Subject of a Foreign Country	☐ 3 ☐ 4 ☐ 5

IV. NATURE OF SUIT (Place an "X" in One Box Only)		FORFEITURE/PENALTY		BANKRUPTCY		OTHER STATUTES	
☐ 110 Insurance	☐ 310 Airplane	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment			
☐ 120 Marine	☐ 315 Airplane Product Liability	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust			
☐ 130 Miller Act	☐ 320 Assault, Libel & Slander	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 430 Banks and Banking	☐ 430 Banks and Banking			
☐ 140 Negotiable Instruments	☐ 330 Federal Employers' Liability	☐ 630 Liquor Laws	☐ 440 Commerce	☐ 440 Commerce			
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 340 Marine	☐ 640 R.R. & Truck	☐ 450 Copyrights	☐ 450 Copyrights			
☐ 151 Medicare Act	☐ 345 Marine Product Liability	☐ 650 Airline Regs.	☐ 460 Patent	☐ 460 Patent			
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 350 Motor Vehicle	☐ 660 Occupational Safety/Health	☐ 470 Trademark	☐ 470 Trademark			
☐ 153 Recovery of Overpayment of Veterans' Benefits	☐ 355 Motor Vehicle Product Liability	☐ 690 Other	☐ 480 Consumer Credit	☐ 480 Consumer Credit			
☐ 160 Stockholders' Suits	☐ 360 Other Personal Injury	☐ 710 Fair Labor Standards Act	☐ 490 Cable/Set TV	☐ 490 Cable/Set TV			
☐ 190 Other Contract	☐ 441 Voting	☐ 720 Labor/Mgmt. Relations	☐ 500 Securities/Commodities/Exchange	☐ 500 Securities/Commodities/Exchange			
☐ 195 Contract Product Liability	☐ 442 Employment	☐ 730 Labor/Mgmt. Reporting & Disclosure Act	☐ 510 Customer Challenge 12 USC 3410	☐ 510 Customer Challenge 12 USC 3410			
☐ 196 Franchise	☐ 443 Housing/Accommodations	☐ 740 Railway Labor Act	☐ 520 Other Statutory Actions	☐ 520 Other Statutory Actions			
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	FEDERAL TAX SUITS	FEDERAL TAX SUITS			
☐ 210 Land Condemnation	☐ 444 Amer. w/Disabilities - Employment	☐ 510 Motions to Vacate Sentence	☐ 570 Taxes (U.S. Plaintiff or Defendant)	☐ 570 Taxes (U.S. Plaintiff or Defendant)			
☐ 220 Foreclosure	☐ 445 Amer. w/Disabilities - Other	☐ 530 General	☐ 571 IRS—Third Party 26 USC 7609	☐ 571 IRS—Third Party 26 USC 7609			
☐ 230 Rent Lease & Ejectment	☐ 446 Other Civil Rights	☐ 535 Death Penalty					
☐ 240 Torts to Land		☐ 540 Mandamus & Other					
☐ 245 Tort Product Liability		☐ 550 Civil Rights					
☐ 290 All Other Real Property		☐ 555 Prison Condition					

V. ORIGIN (Place an "X" in One Box Only)		Re-filed (see VI below)		Reinstated or Reopened		Transferred from another district (specify)		Multidistrict Litigation		Appeal to District Judge from Magistrate Judgment	
☒ 1 Original Proceeding	☐ 2 Removed from State Court	☐ 3	☐ 4	☐ 5	☐ 6	☐ 7	☐ 8	☐ 9	☐ 10	☐ 11	☐ 12

VI. RELATED/RE-FILED CASE(S).	a) Re-filed Case ☐ YES ☒ NO	b) Related Cases ☐ YES ☒ NO
(See instructions second page):	JUDGE	DOCKET NUMBER

VII. CAUSE OF ACTION	Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity): 28 USC §1332 and subsection (d); Class Action Fairness Act of 2005; 28 USC §1367 and 1391
LENGTH OF TRIAL via 5 days estimated (for both sides to try entire case)	

VIII. REQUESTED IN COMPLAINT:	☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23	DEMAND \$ > 5,000,000.00	CHECK YES only if demanded in complaint: JURY DEMAND: ☒ Yes ☐ No
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ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE	SIGNATURE OF ATTORNEY OF RECORD <i>Shirley D. Rudman</i>	DATE 3/26/07
FOR OFFICE USE ONLY		RECEIPT # 539659
AMOUNT 33012		IFP

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U.S. District Court
United States District Court for the Western District of Washington (Seattle)
CIVIL DOCKET FOR CASE #: 2:07-cv-00411-RSM

Whaley v. Menu Foods et al
Assigned to: Hon. Ricardo S Martinez
Cause: 28:1332 Diversity-Product Liability

Date Filed: 03/19/2007
Jury Demand: None
Nature of Suit: 195 Contract Product
Liability
Jurisdiction: Diversity

Plaintiff

Tom Whaley
*individually and on behalf of all others
similarly situated*

represented by **Michael David Myers**
MYERS & COMPANY
1809 7TH AVE
STE 700
SEATTLE, WA 98101
206-398-1188
Fax: FAX 398-1189
Email: mmyers@myers-company.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Menu Foods
a foreign corporation

Defendant

The Iams Company
a foreign corporation

Defendant

Dog Food Producers Numbers 1-50

Defendant

Cat Food Producers 1-40

Date Filed	#	Docket Text
03/19/2007	<u>1</u>	CLASS ACTION COMPLAINT against defendant(s) Menu Foods, The Iams Company, Dog Food Producers Numbers 1-50, Cat Food Producers 1-40 (Summons(es) issued)(Receipt #: SEA8079), filed by Tom Whaley. (Attachments: # <u>1</u> Civil Cover Sheet)(DJ) Modified on 3/21/2007 (DJ). (Entered: 03/21/2007)

PACER Service Center

Transaction Receipt			
03/27/2007 13:22:39			
PACER Login:	mw0078	Client Code:	060228-00001/91103
Description:	Docket Report	Search Criteria:	2:07-cv-00411-RSM
Billable Pages:	1	Cost:	0.08

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1 which was produced by any of the above-named defendants and/or has had a dog or cat become
2 ill as a result of eating the food.

3 1.2 The defendants are producers and distributors of, *inter alia*, dog and cat food.
4 Menu Foods produces dog and cat food under familiar brand names such as Iams, Eukanuba and
5 Science Diet. Menu Foods distributes its dog and cat food throughout the United States to
6 retailers such as Wal-Mart, Kroger and Safeway.

7 1.3 Dog and cat food which the defendants produced has caused an unknown number
8 of dogs and cats to become ill and die.

9 1.4 To date, Menu Foods has recalled 50 brands of dog food and 40 brands of cat
10 food which are causing dogs and cats to become ill. All recalled food to date is of the "cuts and
11 gravy wet" style.
12

13 1.5 As a result of the Defendants' actions Mr. Whaley and other Class members have
14 suffered emotional and economic damage.

15 IL PARTIES

16 2.1 Plaintiff Tom Whaley has at all material times been a resident of Ontario, Oregon.

17 2.2 Defendant Menu Foods is, upon information and belief, a corporation organized
18 under the laws of Canada which transacts business in Washington State and Oregon State.

19 2.3 Defendant The Iams Company, is upon information and belief, a foreign
20 corporation which transacts business in Washington State and Oregon State.
21

22 III. JURISDICTION AND VENUE

23 3.1 Subject matter jurisdiction is proper under 28 U.S.C. § 1332(a)(1) because the
24 Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds
25

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1 \$75,000.00. This court has supplemental jurisdiction over the state law claims pursuant to 28
2 U.S.C. § 1367.

3 3.2 Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because
4 the Defendants systematically and continuously sold their product within this district and
5 Defendants transact business within this district.

6 IV. CLASS ACTION ALLEGATION

7 4.1 Mr. Whaley brings this suit as a class action pursuant to Rules 23(a), (b)(1), (b)(2)
8 and (b)(3) of the Federal Rules of Civil Procedure, on behalf of himself and a Plaintiff Class (the
9 "Class") composed of all persons who purchased any dog or cat food which was produced by the
10 defendants and/or has had a dog or cat become ill as a result of eating the food. Mr. Whaley
11 reserves the right to modify this class definition prior to moving for class certification.

12 4.2 This action has been brought and may be properly maintained as a class action
13 pursuant to Rule 23 of the Federal Rules of Civil Procedure for the following reasons:

14 a. The Class is ascertainable and there is a well-defined community of
15 interest among the members of the Class;

16 b. Membership in the Class is so numerous as to make it impractical to bring
17 all Class members before the Court. The identity and exact number of Class members is
18 unknown but is estimated to be at least in the hundreds, if not thousands considering the fact that
19 Menu Foods has identified 50 dog foods and 40 cat foods which may be causing harm to pets.
20

21 c. Mr. Whaley's claims are typical of those of other Class members, all of
22 whom have suffered harm due to Defendants' uniform course of conduct.
23

24 d. Mr. Whaley is a member of the Class.
25

CLASS ACTION COMPLAINT - 3

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1 e. There are numerous and substantial questions of law and fact common to
2 all of the members of the Class which control this litigation and predominate over any individual
3 issues pursuant to Rule 23(b)(3). The common issues include, but are not limited to, the
4 following:

5 i. Did the defendants make representations regarding the safety of
6 the dog and cat food they produced and sold?

7 ii. Were the defendants' representations regarding the safety of the
8 dog and cat food false?

9 iii. Did the defendants' dog and cat food cause Mr. Whaley and other
10 Class members' pets to become ill?

11 iv. Were Mr. Whaley and other Class members damaged?

12 f. These and other questions of law or fact which are common to the
13 members of the Class predominate over any questions affecting only individual members of the
14 Class;
15

16 g. Mr. Whaley will fairly and adequately protect the interests of the Class in
17 that Mr. Whaley has no interests that are antagonistic to other members of the Class and has
18 retained counsel competent in the prosecution of class actions to represent himself and the Class;

19 h. Without a class action, the Class will continue to suffer damage,
20 Defendants' violations of the law or laws will continue without remedy, and Defendants will
21 continue to enjoy the fruits and proceeds of their unlawful misconduct;

22 i. Given (i) the substantive complexity of this litigation; (ii) the size of
23 individual Class members' claims; and (iii) the limited resources of the Class members, few, if
24
25

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1 any. Class members could afford to seek legal redress individually for the wrongs Defendants
2 have committed against them;

3 j. This action will foster an orderly and expeditious administration of Class
4 claims, economics of time, effort and expense, and uniformity of decision;

5 k. Inferences and presumptions of materiality and reliance are available to
6 obtain class-wide determinations of those elements within the Class claims, as are accepted
7 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendants'
8 common liability, the Court can efficiently determine the claims of the individual Class
9 members;
10

11 l. This action presents no difficulty that would impede the Court's
12 management of it as a class action, and a class action is the best (if not the only) available means
13 by which members of the Class can seek legal redress for the harm caused them by Defendants.

14 m. In the absence of a class action, Defendants would be unjustly enriched
15 because they would be able to retain the benefits and fruits of their wrongful conduct.

16 4.3 The Claims in this case are also properly certifiable under applicable law.

17 V. STATEMENT OF FACTS

18 5.1 Plaintiff Tom Whaley was the owner of a female cat named Samoya.

19 5.2 Mr. Whaley purchased Iams brand cuts and gravy wet-style cat food from Wal-
20 Mart for Samoya to consume.

21 5.3 Samoya ate the Iams brand cuts and gravy wet-style cat food between December
22 2006 and February 2007.
23
24
25

1 5.4 Samoya became extremely ill and Mr. Whaley took her to a veterinarian who
2 informed him that Samoya had suffered kidney failure, also known as acute renal failure.
3 Samoya had to be euthanized.

4 5.5 In March 2007 Menu Foods recalled 50 brands of cuts and gravy wet-style dog
5 food and 40 brands of cuts and gravy wet-style cat food which had caused dogs and pets to
6 become ill. One common symptom in the sick animals was kidney failure, also known as acute
7 renal failure.

8 5.6 The Iams brand cuts and gravy wet-style cat food that Samoya consumed between
9 December 2006 and February 2007 is one of the brands that Menu Foods recalled.

10 5.7 As a result of Defendants' acts and omissions Mr. Whaley and other Class
11 members have suffered emotional and economic damage.
12

13 VI. CAUSES OF ACTION

14 A. Breach of Contract

15 6.1 Plaintiff realleges all prior allegations as though fully stated herein.

16 6.2 Plaintiff and Class members purchased pet food produced by the defendants based
17 on the understanding that the food was safe for their pets to consume.

18 6.3 The pet food produced by the defendants was not safe for pets to consume and
19 caused dogs and cats to become ill. The unsafe nature of the pet food constituted a breach of
20 contract.

21 6.4 As a result of the breach Plaintiffs and Class members suffered damages which
22 may fairly and reasonably be considered as arising naturally from the breach or may reasonably
23 be supposed to have been in the contemplation of the parties, at the time they made the contract,
24 as the probable result of the breach of it.
25

1 B. Unjust Enrichment

2 6.5 Mr. Whaley realleges all prior allegations as though fully stated herein.

3 6.6 Defendants were and continue to be unjustly enriched at the expense of Mr.
4 Whaley and other Class members.

5 6.7 Defendants should be required to disgorge this unjust enrichment.

6 C. Unlawful, Deceptive and Unfair Business Practices

7 6.8 Mr. Whaley realleges all prior allegations as though fully stated herein.

8 6.9 Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair
9 business act within the meaning of the Washington Consumer Protection Act, RCW 19.86 *et*
10 *seq.*, and similar statutory enactments of other states (including consumer protection and
11 consumer sales practice acts).

12 6.10 Defendants' sale of hazardous pet food has the capacity to deceive a substantial
13 portion of the public and to affect the public interest.

14 6.11 As a result of Defendants' unfair or deceptive acts or practices Mr. Whaley and
15 other class members suffered injuries in an amount to be proven at trial.

16 D. Breach of Warranties

17 6.12 Mr. Whaley realleges all prior allegations as though fully stated herein.

18 6.13 Cat food and dog food produced by Menu Foods are "goods" within the meaning
19 of Uniform Commercial Code Article 2.

20 6.14 Defendants' conduct as described herein constitutes breach of an implied or
21 express warranty of affirmation.

22 6.15 Defendants' conduct as described herein constitutes breach of an implied
23 warranty of merchantability.

24 CLASS ACTION COMPLAINT - 7

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1 6.16 Defendants' conduct as described herein constitutes breach of an implied
2 warranty of fitness for a particular purpose.

3 6.17 As a proximate result of the aforementioned wrongful conduct and breach, Mr.
4 Whaley and other class members have suffered damages in an amount to be proven at trial.
5 Defendants had actual or constructive notice of such damages.

6 E. Negligent Misrepresentation

7 6.18 Mr. Whaley realleges all prior allegations as though fully stated herein.

8 6.19 Defendants owed Mr. Whaley and class members a duty to exercise reasonable
9 care in representing the safety of its dog and cat foods.

10 6.20 Defendants falsely represented that its dog and cat food was safe for consumption
11 by dogs and cats.

12 6.21 In reality, defendants' dog and cat food caused dogs and cats to become ill and, in
13 some cases, to die.

14 6.22 Mr. Whaley and class members reasonably relied on the information provided by
15 Defendants regarding the safety of its dog and cat food.

16 6.23 As a proximate cause of Defendants' false representations Mr. Whaley and other
17 Class members suffered damages in an amount to be proven at trial.

18 **VII. PRAYER FOR RELIEF**

19 WHEREFORE, Mr. Whaley and Class members request that the Court enter an order of
20 judgment against Defendants including the following:

21 A. Certification of the action as a class action pursuant to Rule 23(b)(3) of the
22 Federal Rules of Civil Procedure with respect to the claims for damages, and appointment of
23 Plaintiffs as Class Representatives and their counsel of record as Class Counsel;

24 CLASS ACTION COMPLAINT - 8

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1 B. Actual damages (including all general, special, incidental, and consequential
2 damages), statutory damages (including treble damages), punitive damages (as allowed by the
3 law(s) of the states having a legally sufficient connection with defendants and their acts or
4 omissions) and such other relief as provided by the statutes cited herein;

5 C. Prejudgment and post-judgment interest on such monetary relief;

6 D. Equitable relief in the form of restitution and/or disgorgement of all unlawful or
7 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct
8 alleged herein;

9 E. Other appropriate injunctive relief;

10 F. The costs of bringing this suit, including reasonable attorneys' fees; and

11 G. Such other relief as this Court may deem just, equitable and proper.

12 DATED this 19th day of March, 2007.

13 MYERS & COMPANY, P.L.L.C.

14 Attorneys for Plaintiffs and Class members

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16 Michael David Myers
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24 CLASS ACTION COMPLAINT - 9

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PAF

U.S. District Court (Live Database)
U.S. District Court - Eastern District of Tennessee (Knoxville)
CIVIL DOCKET FOR CASE #: 3:07-cv-00094

Holt v. Menu Foods Inc.
Assigned to: Honorable Thomas W Phillips
Referred to: Magistrate C Clifford Shirley
Cause: 28:1391 Personal Injury

Date Filed: 03/19/2007
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory
Actions
Jurisdiction: Federal Question

Plaintiff

Lizajean Holt

represented by **A James Andrews**
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V.

Defendant

Menu Foods Inc.

Date Filed	#	Docket Text
03/19/2007	<u>1</u>	COMPLAINT against Menu Foods Inc. (Filing fee \$ 350), filed by Lizajean Holt. (Phillips/Shirley)(RLK) (Entered: 03/20/2007)

03/19/2007

Filing fee: \$ 350, receipt number K3004752 (RLK) (Entered:
03/20/2007)

PACER Service Center			
Transaction Receipt			
03/27/2007 16:24:16			
PACER Login:	mw0078	Client Code:	060228-00001/91103
Description:	Docket Report	Search Criteria:	3:07-cv-00094
Billable Pages:	1	Cost:	0.08

12

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION**

LIZAJEAN HOLT,

**Individually, and on behalf of similarly
situated persons,**

Plaintiff,

v.

MENU FOODS, INC.,

Defendant.

No. _____

Class action

**JURY DEMAND
CLASS ACTION**

CLASS ACTION COMPLAINT

I. Class Action

1. Plaintiff, individually and as representative of a Class of similarly situated persons more defined below, brings suit against the named Defendant for offering for sale and selling to Plaintiff and Class members pet food and food products – “cut and gravy” pet products – formally recalled on March 16, 2007. Defendant is a corporation doing business and operating in the United States. Defendant recalled cat and dog food products that are sold under numerous brands by several national chain stores in Tennessee and other States in the United States. The pet food products were produced by Defendant(s), a private label manufacturer, labeled by the Defendant, and then distributed and ultimately sold to Plaintiff, Class Members, and others. Defendant issued or caused to be issued a press release announcing the recall, and the United States Food and Drug Administration issued a press release the same day. These pet food products were intended to be placed in the stream of commerce and distributed and offered for sale

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and sold to Plaintiff and purchasers in Tennessee and the United States and fed to their pets, cats and dogs.

II. Jurisdiction and Venue

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 and subsection (d), and the Class Action Fairness Act of 2005, Pub. L. 109-2 (Feb. 18, 2005); and over supplemental state law claims pursuant to 28 U.S.C. §1367.

3. Venue is proper in this Court and judicial district pursuant to 28 U.S.C. §1391 and/or Pub. L. 109-2 because a part or substantial part of the events or omissions giving rise to the claim occurred in this judicial district, or a substantial part of property that is the subject of the action is situated in this judicial district.

4. In this judicial district, Plaintiff purchased the recalled pet food product made by or for Defendant, and her pet ate or consumed it. Thousands of other consumers/customers – including Plaintiff and other Class Members – purchased the recalled or contaminated products in this judicial district from retailers that Defendant, its agents, affiliates, or others it or they controlled sold or made available to them. In turn, retailers or others sold these recalled products to the general public, including Plaintiff, Class members and other purchasers. These products were purchased for consumption by the pets of Plaintiff and the Class members. Defendant made or caused these products to be offered for sale and sold to the public, including Plaintiff.

5. Rule 23 of the Federal Rules of Civil Procedure applies to class actions as well.

III. Plaintiff

6. At all times material hereto, Plaintiff Lizajean Holt was and is a citizen of the State of Tennessee and the United States and resides in Knox County, Tennessee.

IV. Plaintiff's Purchase(s)/Defendant's Recall

7. Plaintiff purchased recalled brands of Pet Pride and Iams pet food from a national chain grocery store, Kroger, operating in Knox County, Tennessee. Kroger, like other retailers, did not alter the product produced by the Defendant in any way prior to selling it to Tennessee consumers and other consumers throughout the United States.

8. Without knowing that Defendants would recall the product after it was offered for sale and sold to her, Plaintiff purchased and fed the product(s) to her cat, her pet. Her pet became lethargic and began drinking large amounts of water and Plaintiff discontinued feeding the Defendant's products to her cat prior to the recall notice. Plaintiff and thousands of other consumers will now face veterinary bills to have their pets evaluated for kidney damage.

9. Before her purchase, Defendant never warned Plaintiff that the pet food product that she purchased for feeding her pet may or would cause it have health problems or concerns or that she would have to take her pet to a veterinarian due to a health concern relating to or resulting from the tainted pet food.

10. On or on about March 16, 2007, Defendant issued a recall for certain pet food for cats and dogs that it manufactured in plants that it controlled, owned, operated, or managed in the United States.

11. Defendant's business consists substantially of providing private label pet foods at its plants or pet foods under other brands, not its own. In turn, Defendant's

products are sold under a variety of labels or brands listed on its website as of March 17, 2007 and set forth below.

12. The product that Plaintiff purchased at a Kroger in Knoxville was a product recalled by Defendant.

13. After Plaintiff purchased the pet food and fed it to her cat, she learned about the recall and the actual or potential problems and concerns from purchasing and feeding the product to her pet.

14. Plaintiff bought the product(s) for their intended purposes: to feed her pet.

15. Defendant placed these pet products in the stream of commerce in Tennessee and elsewhere expecting that consumers such as Plaintiffs, the Class members, and the general public would feed these products to their pets.

V. Defendant, Its Business, and the Recall

16. At all times material hereto, Defendant Menu Foods, Inc. was and is a New Jersey corporation with its principal place of business in the State of New Jersey, specifically located at 9130 Griffith Morgan Lane, Pennsauken NJ 08110. Defendant is ultimately owned or controlled by Menu Foods Income Group, an Ontario based legal entity. Some of Defendant's high managerial or officers or agents with substantial authority are also high managerial officers or agents of Menu Foods Income Group. Defendant may be served through the Secretary of State for Tennessee or as provided by law.

17. Defendant Menu Foods, Inc. owns, controls, is related to or an affiliate of a firm with plants where the pet food is manufactured or processed that are located in the United States. These plants are located in Emporia, Kansas and, Pennsauken, New

Jersey, the place of manufacture where the pet products were recalled, and/or at other locations in the United States.

18. Defendant is the leading North American private label/contract manufacturer of wet pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other wholesale and retail outlets, including Wal-Mart, Safeway, Kroger, PetSmart, Inc., Giant Food, and other large retail chains, and has provided pet food products to or for Proctor & Gamble, Inc. It produces hundreds of millions of containers of pet food annually.

19. Defendant has manufactured or produced pet food for private labels for about 17 of the 20 leading retailers in the United States.

20. Defendant's business includes manufacturing, producing, distributing, or selling cat food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Best Choice, Companion, Compliments, Demoulus Market Basket, Eukanuba, Fine Feline Cat, Food Lion, Food Town, Giant Companion, Hannaford, Hill Country Fare, Hy-Vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Nutriplan, Nutro Max Gourmet Classics, Nutro Natural Choice, Paws, Pet Pride, President's Choice, Priority, Sav-a-Lot, Schnucks, Science Diet Feline Savory Cuts Cans, Sophsitacat, Special Kitty US, Springfield Prize, Sprout, Total Pet, Wegmans, Western Family, White Rose, and Wynn Dixie.

21. Defendant's business includes manufacturing, producing, distributing, or selling dog food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Award, Best Choice, Big Bet, Big Red, Bloom, Bruiser, Cadillac, Companion, Demoulus Market Basket, Eukanuba, Food Lion,

Giant Companion, Great Choice, Hannaford, Hill Country Fare, Hy-vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Mixables, Nutriplan, Nutro Max, Nutro Ultra, Nutro, Ol'Roy US, Paws, Pet Essentials, Pet Pride – Good & Meaty, President's Choice, Price Chopper, Priority, Publix, Roche Brothers, Sav-a-Lot, Schnucks, Shep Dog, Sprout, Statler Bros, Total Pet, Western Family, White Rose, Wynn Dixie, and Your Pet.

22. On Defendant's website as of March 17, 2007, it listed by brands, the size of the container or pouch, the dates of manufacture, and the products subject to recall. Thus, each container or pouch and size of each brand or label listed – subject to the recall above – was noted specifically on its web site. Thus, a 3 ounce can or pouch of Pet Pride Pouch Mixed Grill 24 X 3 with sale by date of March 8, 2009, with a specified "UPC" number was one of about 150 separate Pet Pride labeled cat food that Defendant recalled. The other brands also generally listed numerous separate pouches or containers bearing the major private label or brand with a further sub-description similar to the manner described above, by brand or label.

23. After reports or complaints from pet owners about symptoms – such as vomiting or lethargy – suggesting kidney failure in their dogs and cats and/or after reports of deaths of certain pets, from or through its Canadian office or affiliation, Defendant caused or issued a recall of certain specified pet products, reportedly totaling between 40 and 60 million cans.

24. Defendant also advised a governmental agency of the United States about the recall and certain events leading to the recall, namely the Food and Drug Administration (FDA).

25. Defendant produces over 1,000,000,000 pouches or containers of pet food products each year, a substantial portion of which is sold or offered for sale in Tennessee or for Tennesseans who purchase the products for their pets. Many consumers who fear for the health of their pets will no longer have the product because it has been fed to the pets.

26. Defendant knows or should know that national, regional, and/or local distributors will distribute these finished pet food products that it manufactures or processes to retailers to offer them for sale in Tennessee to Tennesseans who purchase and buy them for their pets for consumption by their pets in the State of Tennessee and in this judicial district.

27. Defendant knows or understands that millions or tens of millions of cans or pouches of the pet food products that it manufactures or produces will be advertised, promoted, and sold in Tennessee and this judicial district, including a significant or substantial part of the recalled pet food.

28. Defendant knows or understands that the promotion and advertising of pet food produced at its plants in part targets consumers and customers in Knox County, in this judicial district, in the State of Tennessee, regionally, or nationally.

29. Defendant makes or produces the pet food products in its plants with a purpose or design that consumers and customers will purchase them, regardless of brand or label name, place of purchase, or place where pets actually consume them.

30. Defendant makes or produces for third parties well-known, lesser known, and/or premium or discount brands or labels of pet foods and knows that customers and consumers will ultimately purchase them to feed to their pets.

31. Defendant desires that consumers and others who purchase or consider purchasing a pet food product made or produced in one of its plants, by whatever label or brand, believe that the pet food product is safe for their pets to eat.

32. In the last few days, Defendant has recalled specified pet food products that consumers and customers purchased from a time beginning about December 3, 2006 and concluding about March 6, 2007.

33. Class members and others have purchased the pet products that were recalled across the United States, in Tennessee, and in this judicial district.

34. Class members and others who purchased or fed Defendant's products to their pets did so in this judicial district, in Tennessee, and in the United States.

35. Some class members or others have already taken their pets to a veterinarian for treatment or diagnosis related to their pets eating the recalled pet food and more will do so as word of the recall spreads. For instance, the Knoxville NewsSentinel carried a prominent story about the recall and the potential dangers to the pets of East Tennessee citizens in its Sunday, March 18, 2007 edition.

36. Class members have suffered and will suffer injuries, losses, or damage as a result of the recall and/or feeding their animals the food that was recalled.

37. There have been other reported incidents of pet food being recalled as a result of possible or actual concerns or problems with the pet food and its or their effects on pets. Defendant knew or should have known about the risks and possible injury.

VI. Plaintiff, Class Members, and Others' Losses, Damages, and Injuries

38. As a result of their purchases of the pet food recalled or subject to recall, set forth above, Plaintiff, Class members, and others have suffered and will suffer a loss,

damage, injury, and sustained damages, including consequential and incidental damages, such as costs of purchasing the contaminated food product and replacing it with a safe food product, including sale tax or a similar tax, costs of making an additional trip to a retail store to purchase safe, non-contaminated pet food, the price of postage to secure a refund offered by Defendant, the cost of veterinarians, treatment, medicines and the trip(s) to make such visits for diagnosis and treatment, and otherwise.

VII. Breach of Warranties & Remedies

39. Defendant breached express warranties to Plaintiff, the Class, and others, and violated the Uniform Commercial Code.

38. Defendant breached implied warranties to Plaintiff, the Class, and others, and violated the Uniform Commercial Code.

40. Defendant breached the implied warranty of fitness for a particular purpose by claiming certain of the pet food that it manufactured or produced and was recalled were fit and safe for consumption by pets and thereby violated the Uniform Commercial Code.

41. Defendant breached the implied warranty of merchantability. In fact, the pet food subject to recall and purchased or used by Plaintiff, the Class, and others was not merchantable. This breach violated the Uniform Commercial Code.

42. Plaintiffs are entitled to the remedies for breach authorized by the Uniform Commercial Code and other law.

VIII. Negligence

43. Defendants owed Plaintiff and the Class a duty to only offer safe, non-contaminated products for consumption by pets and offered for sale and sold in the stream of commerce.

44. Though its failure to exercise due care Defendant owed Plaintiff, the class, and others, Defendant was negligent in producing, processing, manufacturing, and offering for sale the recalled pet food and pet food products it offered for sale and sold to Plaintiff, the class, and others.

45. Defendant failed to use sufficient quality control, to do adequate testing, to perform proper manufacturing, production, or processing, or failed to take sufficient measures to prevent the pet food products that were recalled from being offered for sale, sold, or fed to pets.

46. Defendant knew or should have known that the pet food that was recalled presented an unacceptable risk to the pets of the Plaintiff, the Class, and others and would result in damage that was foreseeable and reasonably avoidable.

47. The loss, damage, and injuries were foreseeable.

48. Defendant's negligence proximately caused the loss, damage, injury, and damages to Plaintiff, the Class, and others.

IX. Statutory Unfair or Deceptive Trade Practices Act

49. Plaintiff, the Class, purchasers, others, and Defendant are each a "person" within the meaning of Tenn. Code Ann. §47-18-103.

50. Defendant's offer for sale or sale of their recalled pet food products is in or affects trade or commerce in Tennessee.

51. Defendant impliedly represented to the public, Plaintiff, the Class and others that its pet food products were safe for consumption by their pets and could be safely purchased.

52. In fact, Defendant recalled or caused to be recalled millions of containers or pouches of pet food because it risked the health and well-being of consumers, customers, Plaintiff, purchasers, the Class, and others.

53. Defendant violated Tenn. Code Ann. §47-18-104 (a) and sub-parts of (b) by placing these unsafe pet food products in the stream of commerce in Tennessee.

54. Each Plaintiff, Class member, and other person adversely affected in Tennessee has suffered an ascertainable loss of money or property due to a violation of the Consumer Protection Act.

55. Plaintiffs brings a claim for a violation of the Tennessee Consumer Protection Act under Tenn. Code Ann. §47-18-109, including the ascertainable loss of money or property by each such person.

X. Rule 23

56. Plaintiffs ask this Court to certify the following Class:

All persons in the United States who purchased or fed his, her, or their cat(s) or dog(s) pet food produced or manufactured by Defendant that was or will be recalled by the Defendant, including that produced from December 3, 2006 up to and including March 6, 2007.

57. Plaintiff is a member of the Class, sues as a representative party on behalf of all, and avers that the class is so numerous that joinder of all members is impracticable.

58. There are questions of law or fact common to the Class. These common questions include but are not limited to the following:

- a. Whether Defendant sold pet food products that were recalled or subject to a recall?
- b. Whether Defendant advertised, represented, or held itself out as producing or manufacturing a pet food product that was safe for pets of the class members?
- c. Whether Defendant expressly warranted these products?
- d. Whether Defendant impliedly warranted these products for fitness for a particular purpose?
- e. Whether Defendant impliedly warranted these products for merchantability?
- f. Whether Defendant purported to disclaim any express warranty?
- g. Whether Defendant purported to disclaim any implied warranty?
- h. Whether any limitation on warranty fails to meet its essential purpose?
- i. Whether Defendant intended that the pet food products be purchased by Plaintiff, Class members, or others?
- j. Whether Defendant intended or foresaw that Plaintiff, class members, or others would feed their pet food products to their pets?
- k. Whether Defendant recalled the pet food products?
- l. Whether Defendant was negligent in manufacturing or processing the pet food products?
- m. Whether using the products as intended – to feed their pets – resulted in loss, injury, damage, or damages to the Class?
- n. Whether Defendant's negligence proximately caused loss or injury to damages?
- o. Whether Class members suffered direct losses or damages?
- p. Whether Class members suffered indirect losses or damages?

q. Whether Defendants' acts or practices violated state Deceptive Trade Practices Acts?

59. The claims or defenses of the representative parties are typical of the claims or defenses of the Class.

60. The representative parties will fairly and adequately protect the interests of the Class.

61. Prosecuting separate actions by individual members of the Class would create a risk of either –

a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants, the parties who oppose the class, or

b. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

c. Few, if any, Class members have an interest in individually controlling the prosecution of separate actions;

d. Plaintiff is unaware of any litigation concerning the controversy already commenced by members of the class;

e. It is desirable to concentrate the litigation of the claims in this forum;

f. No unusual difficulties are likely to be encountered in the management of a class action.

62. The undersigned Attorneys for Plaintiff and the Class request that the Court appoint them to serve as class counsel first on an interim basis and then on a permanent basis.

63. They will fairly and adequately represent the interests of the class, have identified or investigated the Class's potential claims, are experienced in handling class actions, other complex litigation, and consumer claims of the type asserted in the action, know the applicable law, will commit sufficient resources to represent the class, and are best able to represent the Class.

64. Plaintiff requests this Court to certify this Class in accordance with Rule 23 and the Class Action Fairness Act of 2005.

XII. Jury Demand

65. The Class demands a jury trial on all issues triable by a jury.

XIII. Prayer for Relief

Wherefore, premises considered, Plaintiff prays that the Court grant the following relief:

1. That process issue and Defendant be served. (Plaintiff's counsel will first provide Defendant's agent, Corporation Trust Company, 820 Bear Tavern Road, West Trenton, NJ 08628 with a Notice of Lawsuit by mail pursuant to the Federal Rules)
2. That as soon as practical, the Court certify a Class, defined herein, or modified as appropriate under the facts and law.
3. That the Court find that Plaintiff has satisfied Rule 23's and federal law's requirements for certifying a Class.

4. That the Court find that Defendant manufactured or processed the pet food products that were sold or offered to sale to Plaintiff and the Class.
5. That the Court find that Defendant intended Plaintiff and Class members to believe that the pet foods sold were fit and safe for consumption by their pets.
6. That a trial be held and Defendants be held liable to the Class for – breach of warranty, negligence, and under state statutes prohibiting deceptive trade practices.
7. That the Class be awarded an amount sufficient for direct damages occasioned by Defendants' acts and practices.
8. That the Class be awarded an amount sufficient for indirect, consequential, and incidental damages occasioned by Defendant's acts and practices.
9. That the Class be awarded treble damages or special damages authorized by state statutes prohibiting deceptive trade practices, depending upon the State where the Class Member lives.
10. That the Court award reasonable attorney's fees and costs and expenses recoverable under law.
11. That the Court order such other, further relief as the case requires and justice demands.

Dated: March 19, 2007.

Respectfully submitted,

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/s/Perry A. Craft
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/s/Nichole Bass
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Knoxville, Tennessee 37902
(865) 310-6804

Cost Bond

We are sureties for costs not to exceed \$1,000.

/s/ A. James Andrews

NOLAN

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 3.0 (Chicago)
CIVIL DOCKET FOR CASE #: 1:07-cv-01543

Majerczyk v. Menu Foods, Inc.
Assigned to: Honorable Wayne R. Andersen
Demand: \$75,000
Cause: 28:1332 Diversity-Product Liability

Date Filed: 03/20/2007
Jury Demand: Plaintiff
Nature of Suit: 385 Prop. Damage Prod.
Liability
Jurisdiction: Diversity

Plaintiff

Dawn Majerczyk
*individually and on behalf of a class of
similarity situated individuals*

represented by **Jay Edelson**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Menu Foods, Inc.
a New Jersey Corporation

Date Filed	#	Docket Text
03/20/2007	<u>1</u>	COMPLAINT filed by Dawn Majerczyk; Jury Demand.(gej,) (Entered: 03/21/2007)
03/20/2007	<u>2</u>	CIVIL Cover Sheet (gej,) (Entered: 03/21/2007)
03/20/2007	<u>3</u>	ATTORNEY Appearance for Plaintiff Dawn Majerczyk by Jay Edelson. (gej,) (Entered: 03/21/2007)
03/20/2007	<u>5</u>	SUMMONS Issued as to Defendant Menu Foods, Inc. (gej,) (Entered: 03/21/2007)

PACER Service Center			
Transaction Receipt			
03/27/2007 15:28:46			
PACER Login:	mw0078	Client Code:	060228-00001/91103
	Docket	Search	

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Description:	Report	Criteria:	1:07-cv-01543
Billable Pages:	1	Cost:	0.08

KC FILED

MAR 30 2007

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DAWN MAJERCZYK individually and on
behalf of a class of similarly situated individuals,

Plaintiff,

v.

MENU FOODS, Inc., a New Jersey Corporation,

Defendant.

07CV1543

JUDGE ANDERSEN

MAGISTRATE JUDGE NOLAN

Jury Trial Demanded

CLASS ACTION COMPLAINT

Plaintiff Dawn Majerczyk brings this class action complaint against defendant Menu Foods, Inc. ("Menu Foods") to seek redress for herself and all other individuals injured by its sale of contaminated pet food throughout the United States.

NATURE OF THE CASE

1. Menu Foods, one of the largest pet food manufacturers in the world, recently issued a mass recall of 42 brands of cat food and 51 brands of dog food.
2. That recall was issued -- belatedly -- as a result of evidence that the pet food in question was contaminated with a potentially lethal agent.
3. When ingested by an animal, the contaminated pet food can cause immediate renal failure, resulting in the complete shutdown of the animal's kidneys and, ultimately, its death.
4. Menu Foods' actions in selling the contaminated food and failing to issue the recall sooner were reckless and in breach its duties and warranties to its customers.

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5. Those actions were a proximate cause of injury to and the deaths of currently untold numbers of pets, including plaintiff Dawn Majerczyk's cat, as described more fully below.

6. On behalf of a nationwide class, Majerczyk seeks redress for that misconduct.

PARTIES

7. Plaintiff Dawn Majerczyk is a citizen of Illinois, residing in Cook County, Illinois.

8. Defendant Menu Foods is the self-proclaimed "leading manufacturer of private-label wet pet food in North America." It is a New Jersey Corporation with its principle place of business in New Jersey. It does business throughout the United States, including Cook County, Illinois.

JURISDICTION

9. The Court has original jurisdiction over this complaint pursuant to 28 U.S.C. § 1332(d) because (a) plaintiff and numerous members of her putative class are citizens of states different from those of which Menu Foods is a citizen, (b) the amount in controversy exceeds \$5,000,000, exclusive of interests and costs, and (c) none of the jurisdictional exceptions contained in 28 U.S.C. § 1332(d)(4)-(5) applies to the instant action.

VENUE

10. Venue is proper in this district under, *inter alia*, 28 U.S.C. §§ 1391(a)(1).

FACTS

11. Menu Foods holds itself out to the public as a manufacturer of safe, nutritious, and high-quality dog and cat food.

12. It makes numerous express warranties about the quality of its food and its manufacturing facilities.

13. For example, Menu Foods touts the claim that it "manufacture[s] the private-label, wet pet-food industry's most comprehensive product program with the highest standards of quality" and it operates "state-of-the-art" manufacturing facilities in the United States and Canada.

14. Menu Foods intended for pet owners to believe its statements and trust that its pet food is of first-rate quality.

15. On or about March 16, 2007, Menu Foods announced a recall of approximately 42 brands "cuts and gravy" style dog food and 51 brands of "cuts and gravy" style cat food, all produced at Menu Foods' facility in Emporia, Kansas, between Dec. 3, 2006, and March 6, 2007.

16. Weeks before the recall, Menu Foods had received numerous complaints indicating that the pet food originating from the Emporia plant was killing pets.

17. As a result of these complaint, Menu Foods tested its food on approximately 40 to 50 pets. Seven of those pets died after ingesting the food.

18. Despite having actual knowledge of both the complaints it received and its own study, Menu Foods delayed for weeks before issuing the notice of recall.

19. Even then, its recall was conducted in a negligent manner. For example, both its website and the toll-free telephone number it provided to the public were frequently non-operational.

FACTS RELATING TO THE NAMED PLAINTIFF

20. On or about March 10, 2007, Majerczyk purchased several pouches of Special Kitty Select Cuts from a Walmart store for her nine-year-old cat, Phoenix.

21. Menu Foods is the manufacturer of Special Kitty Select Cuts.

22. On March 16, 2006, shortly after ingesting Menu Food's cat food, Phoenix went into renal failure. Phoenix's kidneys shut down, and on March 17, 2007, he had to be put down.

23. Majerczyk incurred over \$300 in veterinary expenses relating to the attempts to save Phoenix's life.

24. Phoenix had been with Majerczyk's family from birth.

25. The loss was devastating not only to Majerczyk, but also to her seventeen-year-old son and fourteen-year-old daughter as well.

CLASS ALLEGATIONS.

26. Majerczyk brings this action, pursuant to FRCP 23(b)(3), on behalf of herself and a class (the "Class") consisting of herself and all others who purchased pet food in the United States that was ultimately subject to the March 16, 2007 Menu Foods recall.

27. Upon information and belief, there are over 100,000 members of the Class such that joinder of all members is impracticable.

28. Common questions of law and fact exist as to all members of the Class and predominate over questions affecting individual members. Common questions for the Class include:

(a) Did Menu Foods act negligently in failing to prevent the contamination of its pet food?

(b) Did Menu Foods act negligently in failing to warn its customers in a timely and effective manner of the danger of its pet food?

(c) Did Menu Foods' breach express and/or implied warranties relating to the sale of its pet food?

29. Majerczyk will fairly and adequately protect the interests of the Class, her claims are typical of the claims of the members of the class, and she has retained counsel competent and experienced in class action litigation.

30. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy because, among other things, (a) joinder of all members of the class is impracticable, and (b) many members of the class cannot vindicate their rights by individual suits because their damages are small relative to the burden and expense of litigating individual actions.

COUNT I

(Breach of Warranties)

31. Plaintiff incorporates by reference the foregoing allegations.

32. Menu Foods breached express warranties to Plaintiff and violated the Uniform Commercial Code.

33. Menu Foods breached implied warranties to Plaintiff and violated the Uniform Commercial Code.

34. Menu Foods breached the implied warranty of merchantability.

35. As a proximate cause of this misconduct, plaintiff and her class suffered actual damages, including without limitation the cost of the contaminated pet food and any resulting veterinary bills.

WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following relief:

1. An order certifying the Class as defined above;
2. An award of actual damages;
3. Appropriate injunctive relief;
4. Medical monitoring damages;
5. Reasonable attorney's fees and costs; and
6. Such further and other relief the Court deems appropriate.

**COUNT II
(Negligence)**

36. Plaintiff incorporates by reference the foregoing allegations.

37. Menu Foods owed its customers a duty to offer safe, non-contaminated products in the stream of commerce.

38. Menu Foods breached this duty by failing to exercise due care in the producing, processing, manufacturing and offering for sale of the contaminated pet food described herein.

39. Menu Foods further breached this duty by failing timely and effectively to warn plaintiff and the class of the contamination even after it had actual knowledge of that fact and of the resulting risks.

40. As a proximate cause thereof, plaintiff and her class suffered actual damages, including without limitation the cost of the contaminated pet food and any resulting veterinary bills.

WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following relief:

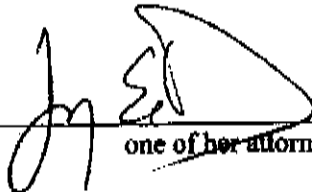
1. An order certifying the Class as defined above;
2. An award of actual damages;
3. Appropriate injunctive relief;
4. Medical monitoring damages;
5. Reasonable attorney's fees and costs; and
6. Such further and other relief the Court deems appropriate.

JURY DEMAND

Plaintiff requests trial by jury of all claims that can be so tried.

March 20, 2007

Dawn Majerczyk, individually and on behalf of a
class of similarly situated individuals



one of her attorneys

John Blim
Jay Edelson
Myles McGuire (Of Counsel)
Blim & Edelson, LLC
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(312) 913-9401 (Fax)

**U. S. District Court
Western District of Arkansas (Fayetteville)
CIVIL DOCKET FOR CASE #: 5:07-cv-05053-JLH**

Sims et al v. Menu Foods Income Fund et al
Assigned to: Honorable Jimm Larry Hendren
Cause: 28:1332 Diversity-Product Liability

Date Filed: 03/21/2007
Jury Demand: Plaintiff
Nature of Suit: 385 Prop. Damage Prod.
Liability
Jurisdiction: Diversity

Plaintiff

Charles Ray Sims
*Individually and on behalf of all others
similarly situated*

represented by **Jason M. Hatfield**
Lundy & Davis, LLP
300 North College Ave.
Suite 309
Fayetteville, AR 72701
(479) 527-3921
Fax: (479) 587-9196
Email: jhatfield@lundydavis.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

Pamela Sims
*individually and on behalf of all others
similarly situated*

represented by **Jason M. Hatfield**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Menu Foods Income Fund

Defendant

Menu Foods Midwest Corporation

Defendant

Menu Foods South Dakota Inc.

Defendant

Menu Foods, Inc.

Defendant

Menu Foods Holdings, Inc.

Date Filed	#	Docket Text
03/21/2007	<u>1</u>	COMPLAINT against Menu Foods Holdings, Inc., Menu Foods Income Fund, Menu Foods Midwest Corporation, Menu Foods South Dakota

		Inc., Menu Foods, Inc. (Filing fee \$ 350 receipt number 5000049.), filed by Charles Ray Sims, Pamela Sims.(ct) (Entered: 03/21/2007)
03/21/2007		6 Summons Issued as to Menu Foods Holdings, Inc., Menu Foods Income Fund, Menu Foods Midwest Corporation, Menu Foods South Dakota Inc., Menu Foods, Inc. and returned to attorney/plaintiff for service (ct) (Entered: 03/21/2007)
03/23/2007	2	Remark copy of complaint and docket sheet sent to MDL (ct) (Entered: 03/23/2007)

PACER Service Center			
Transaction Receipt			
03/27/2007 15:21:04			
PACER Login:	mw0078	Client Code:	060228-00001/91103
Description:	Docket Report	Search Criteria:	5:07-cv-05053-JLH
Billable Pages:	1	Cost:	0.08

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